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Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got it Wrong in Doe v. City of Lafayette, Indiana

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Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got it Wrong in *Doe v. City of Lafayette, Indiana*

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I. INTRODUCTION

A precarious balance and considerable tension exists between two competing legal interests – the essential, First Amendment-grounded[1] human right to freedom of thought,[2] on the one hand, and the desire to prevent harm and injury that might occur if thought is converted to action, on the other. To understand this tension, it is useful to start by considering three different and disturbing factual scenarios.

Scenario 1: A man recently completed a prison term for the crime of assault with a deadly weapon.[3] He now stands outside of Madison Square Garden in New York City. It is September 2, 2004. The man is an anarchist with radical ideas. More than anything else, however, he hates President George W. Bush, who will speak that night at Madison Square Garden.[4] Like many protestors outside of the Republican National Convention,[5] he chants the usual down-with-Bush slogans. However, this man

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1. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925).

2. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (writing that "the *right of freedom of thought* protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all") (emphasis added).

3. *See e.g.* Cal. Penal Code Ann. § 245 (West 2005) (articulating the crime of assault with a deadly weapon).

4. *See generally* Ken Herman, *Bush Promises a Safer America*; *Stay the Course in War on Terror, President Urges*, Atlanta J. & Const. 1A (Sept. 3, 2004) (available at LEXIS, News library, ATLJNL file) (describing President George W. Bush's party nomination acceptance speech at the Republican National Convention on September 2, 2004 at Madison Square Garden).

5. *See generally* David Zucchino, *The Race To The White House; Protests Meet a Nimble NYPD*; *Police Tracked Rallies During the Republican National Convention with the Web and Bike*, L.A. Times

also thinks about what it would be like to kill the President. He fantasizes about shooting President Bush as he watches the presidential motorcade arrive and he sees the President step out of his car to wave to the crowd. But the man does not act on his fantasies. After President Bush enters Madison Square Garden, the man peacefully leaves the scene and heads home.

Scenario 2: A fourteen-year-old boy is often taunted by classmates at school because he is perceived to be a "freak." The boy loves to play video games, both at home and at an arcade a block away from his school. His favorite games depict graphic images of violence, much like those played by Eric Harris and Dylan Klebold, the killers at Columbine High School.[6] As he plays the games, he fantasizes about walking down the block, entering his school and killing three of his classmates who bully him the most. He admires Michael Carneal, a student near Paducah, Kentucky who came into school one day in 1997 and opened fire on some classmates, killing three students.[7] Although the boy has access to a gun at home, he never brings it to school or converts his thoughts to action. He always goes home from the video arcade peacefully.

Scenario 3: A man has "a long history of arrests and convictions for sexually related crimes."[8] Although now free from prison and nearly a decade removed from his last conviction, "he still has fantasies about children."[9] One day, he drives to a park and watches "five youths in their early teens playing on a baseball diamond."[10] While watching the children, he thinks about having sexual contact with them.[11] However, "without having any contact with them,"[12] he leaves the park peacefully, telling himself, "I've got to get out of here before I do something."[13] The man later states

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A21 (Sept. 4, 2004) (available at LEXIS, News library, LAT file) (describing protests outside of the Republican National Convention).

6. *See generally* Lynn Bartels & Ann Imse, *Friendly Faces Hid Kid Killers: Social, Normal Teens Eventually Harbored Dark, Sinister Attitudes*, Rocky Mt. News (Denver, Colo.) 10A (Apr. 22, 1999) (available at LEXIS, News library, RMTNEW file) (describing how Eric Harris and Dylan Klebold "linked their home computers and for hours played violent video games"); Mitchell Zuckoff & Ellen O'Brien, *Town, Nation Staggered by School Killings*, Boston Globe (Boston, Mass.) A1 (Apr. 22, 1999) (describing the tragedy at Columbine High School as "one of the deadliest school attacks in US history" and noting that "[t]he two suspects, Eric D. Harris, 18, and Dylan Bennet Klebold, 17, misfits who dabbled in Nazi worship and other antisocial behavior, allegedly vented their shared, murderous anger in a midday rampage . . . that was at once viciously methodical and horribly random").

7. *See generally* Monte Reel, *Kentucky Teen-Ager Kills 3 At School; 5 Others in Prayer Group Are Shot in West Paducah Attack; Police Arrest 14-Year-Old Boy*, St. Louis Post-Dispatch (St. Louis, Mo.) A1 (Dec. 2, 1997) (available at LEXIS, News library, SLPD file).

8. *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 758 (7th Cir. 2004).

9. *Id.* at 774 (Williams, Rovner & Wood, JJ., dissenting).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

in a sworn affidavit, "I certainly had sexual thoughts. However, I was not planning to act on my thoughts. I recognized that these were just unhealthy thoughts and I realized I needed to leave the park, which is what I did."[14]

The first two of these three scenarios are fictitious, yet probably not too much of a stretch today, given both the anger and deep-seated feelings toward President Bush outside of the Republican National Convention and the school shootings across the United States that so often are blamed on media products like video games.[15] The third scenario, involving the sexual predator that somewhat sounds as if it were ripped from the lead lines of an aging Jethro Tull song,[16] is anything but fictitious. In fact, it gave rise to an important federal lawsuit, *Doe v. City of Lafayette, Indiana*, which has worked its way through the federal court system, from the district court level[17] to a three-judge appellate court[18] and, finally, in July 2004, to an en banc, 8-3 divided decision by the United States Court of Appeals for the Seventh Circuit.[19]

City of Lafayette is a unique case on the important human right of freedom to think. As Kenneth J. Falk, the attorney for defendant John Doe and the Legal Director of the Indiana Civil Liberties Union,[20] told the *Washington Times*, "I am unaware of any other case in the country like this. This focuses on your thoughts. Usually we don't know what people think unless thought is tied to action. It's really unique to be banned [from parks] based on your thoughts."[21]

While the issue in *City of Lafayette* of "whether the First Amendment protects a citizen who goes to a venue and thinks about committing a crime"[22] has not been addressed by most courts in the United States, its relevance extends far beyond the narrow confines of its facts. Indeed, it would cover the first two hypotheticals set forth above, as well as any other

14. *Id*.

15. *Cf.* Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 Hastings Commun. & Ent. L.J. 215, 218 (2002) (describing how "a sporadic number of school shootings, such as the one in Santee, California in March 2001, have kept media attention and, in turn, public and legislative attention focused on the allegedly harmful effects of media products on youths").

16. *See* Jethro Tull, *Aqualung*, in *Aqualung* (Reprise 1971) (L.P.) (describing an old man "[s]itting on a park bench eyeing little girls with bad intent . . . watching as the frilly panties run").

17. 160 F. Supp. 2d 996 (N.D. Ind. 2001), *rev'd*, 334 F.3d 606 (7th Cir. 2003), *aff'd on reh'g*, 377 F.3d 757 (7th Cir. 2004).

18. 334 F.3d 606; *vacated and reh'g granted*, 2003 U.S. App. LEXIS 16563 (7th Cir. Aug. 8, 2003).

19. 377 F.3d at 757 (en banc).

20. *See* Indiana Civil Liberties Union, *Who We Are*, http://www.iclu.org/who_we_are (accessed Apr. 23, 2005).

21. Frank J. Murray, *Lifting of Ban on Sex Predator in Parks to be Appealed*, Wash. Times (July 3, 2003) (available at http://www.washingtontimes.com/national/20030702-113116-8223r.htm).

22. *City of Lafayette*, 377 F.3d at 778 (Williams, Rovner & Wood, JJ., dissenting).

scenario in which a person harbors a thought to violate a criminal statute. This issue extends to the driver who, when he is pulled over by a police officer for allegedly speeding, thinks to himself as the officer walks up to his car, "I'd love to kill that cop. Why isn't he handling a real crime?"[23] It also applies to the husband who holds an internal monologue and fantasizes about avenging the brutal rape of his wife while he watches the rapist in court being sentenced to only seven years in prison. The implications of the issue in *City of Lafayette* are immense.

As a general principle, "[p]eople don't get arrested for what they write or what they think. They get arrested for what they do."[24] The holding in *City of Lafayette*, when taken to its logical–perhaps, from the dissent's perspective, illogical–conclusion, suggests that this maxim may no longer hold true. While it may have been clear in the past that one could think about supporting terrorist groups like al-Qaida and their criminal activities without running afoul of the law, this may no longer be the case.[25] The notion of an Orwellian thought-crime[26] may indeed cross the minds of some readers of the 2004 opinion in *City of Lafayette*.

This article examines and critiques the majority opinion of the Seventh Circuit Court of Appeals in *City of Lafayette*.[27] The majority held that the

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23. To further show the problem illustrated by this example, one must understand and remember that Tupac Shakur's songs called "Soulja's Story" and "Crooked Ass Nigga," both of which express criminal sentiments about killing police officers, are fully protected by the First Amendment as free speech. It would be ironic and nonsensical, then, if *speech* about killing the police were protected by the First Amendment but *thoughts* about killing the police were not so sheltered. *See Davidson v. Time Warner, Inc.*, 1997 U.S. Dist. LEXIS 21559 at **5, 71-72 (S.D. Tex. Mar. 31, 1997) (writing that "although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip Shakur's free speech rights," and adding that "the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views"); Tupac Shakur, *Soulja's Story*, in *2Pacalyse Now* (Interscope Records 1991) (CD) ("Cops on my tail, so I bail till I dodge 'em. They finally pull me over and I laugh. Remember Rodney King, and I blast on his punk ass.").

24. Sean Kelly, *Arrest Not Tied to Article*, Denver Post B-02 (June 2, 2004) (available at LEXIS, News library, DPOST file) (quoting Bob Grant, a district attorney for the Colorado counties of Broomfield and Adams).

25. In sentencing Mukhtar al-Bakri to ten years in federal prison in December 2003 for aiding al-Qaida by training with the terrorist organization in Afghanistan, U.S. District Judge William M. Skretny stated: "You are not being punished for what you think, or because of the possibility that you may be dangerous. You are being punished because you knowingly and willfully engaged in conduct that is contrary to the laws of the United States." Dan Herbeck, *10 Years for First of Six*, Buffalo News (Buffalo, N.Y.) A1 (Dec. 4, 2003) (available at LEXIS, News library, BUFNEW file). As Judge Skretny's comments suggest, there traditionally has been a marked difference between thoughts and conduct in the law.

26. *See generally* Rene Sanchez, *Librarians Make Some Noise Over Patriot Act; Concerns About Privacy Prompt Some to Warn Patrons, Destroy Records of Book and Computer*, Wash. Post A20 (Apr. 10, 2003) (available at LEXIS, News library, WPOST file) (describing how author George Orwell's now half-century old book, *1984*, "depicts a world in which an all-powerful government known as 'Big Brother' meddles in citizens' private lives and punishes them even for thought crimes").

27. 377 F.3d 757.

city's ban of John Doe, a convicted sex offender, from its parks because he once fantasized about molesting children while watching them play in the park does *not* violate the First Amendment right to freedom of thought.[28] The July 2004 en banc opinion reversed the result of an earlier vacated decision by a three-judge panel of the same court just thirteen months before.[29] The panel held that the park ban violated the unenumerated constitutional right of freedom of thought.[30] The two judges who voted in favor of John Doe the first time the appellate court heard the case, Judge Ann Claire Williams[31] and Judge Diane Pamela Wood,[32] suddenly found themselves in a three-judge minority, along with Judge Ilana Diamond Rovner,[33] in July 2004. They faced an eight-judge majority that included the prominent and powerful Richard Posner.[34] However, as this article demonstrates, there is much more to this case that is interesting and unusual than the counterintuitive nature of the gender breakdown of the jurists. The three female jurists were the *only* appellate court judges to take the side of a convicted male sex offender, while all eight male judges in the en banc proceeding ruled against Doe.[35]

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28. *See id.* at 767 ("The First Amendment does not prohibit the City from taking the action it did to protect its children. It does not require the City to act in an ostrichlike fashion and expose the children of the City to the risk that, on a future date, a child will wander further from the group, present a better opportunity and experience tragic consequences.").

29. *Doe*, 334 F.3d 606.

30. *Id*. at 606.

31. Judge Williams, who was born in 1949 in Detroit, Michigan, has served on the Seventh Circuit Court of Appeals since 1999 after being nominated by President Bill Clinton. *See* Federal Judicial Center, *Judges of the United States Courts*, http://www.fjc.gov/servlet/tGetInfo?jid=2591 (accessed Apr. 23, 2005).

32. Judge Wood, who was born in 1950 in Plainfield, New Jersey, has served on the Seventh Circuit since 1995 after she was nominated by President Bill Clinton. She once was a clerk for former United States Supreme Court Justice Harry Blackmun. *See* Federal Judicial Center, *Judges of the United States Courts*, http://www.fjc.gov/servlet/uGetInfo?jid=2636 (accessed Apr. 23, 2005).

33. Judge Rovner, who was born in 1938 in Riga, Latvia, has served on the Seventh Circuit Court of Appeals since 1992 after she was nominated by President George H. W. Bush. *See* Federal Judicial Center, *Judges of the United States Courts*, http://www.fjc.gov/servlet/uGetInfo?jid=2066 (accessed Apr. 23, 2005).

34. For purposes of full disclosure and to demonstrate objectivity, the author of this article has lauded the work of Judge Posner on another First Amendment case involving a very different issue, but this time the author rejects the reasoning of the majority opinion in *City of Lafayette* in which Judge Posner joined. *See* Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 San Diego L. Rev. 1 (2002) (praising Judge Posner's opinion protecting the free speech rights of minors to play video games depicting violent images in *Am. Amus. Mach. Assn. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001)).

35. The eight-judge, all-male majority was comprised of Chief Judge Joel Martin Flaum and Circuit Judges Richard Allen Posner, John Louis Coffey, Frank Hoover Easterbrook, Kenneth Francis Ripple, Daniel Anthony Manion, Michael Stephen Kanne and Terence Thomas Evans. *See City of Lafayette*, 377 F.3d at 757-58 (listing the judges taking part in the decision and identifying those who dissented from the rest); *see* Federal Judicial Center, *Courts of the Federal Judiciary*, http://www.fjc.gov/servlet/tGetCourt?cid=23&order=a (accessed Apr. 23, 2005).

This decision has also become somewhat of a political litmus test for politicians in Indiana. As the Associated Press reported shortly after the Seventh Circuit handed down its decision, "[t]wo candidates who want to represent Lafayette in the Indiana House praised a federal court ruling barring a convicted child molester from city parks but said a statewide version of the ban is needed."[36] To put that into context, a decision from the judiciary rejecting a constitutional right to freedom of thought now has resulted in calls for the legislative branch to essentially codify that ruling. Joe Micon, the Democratic candidate, explicitly stated his willingness to change the constitution when he professed, "I would be supportive of legislation."[37]

What candidate, of course, would *not* want to pander to parents and support such legislation? It is easy to run for office and to support legislation when it is strategically and narrowly framed,[38] such as the concise and visceral frame of "protect children from a pedophile" rather than the more complex and less emotionally appealing frame of "protect a constitutional right from legislative usurpation."[39] In justifying his mission to ban John Doe from Lafayette's parks, David Heath, mayor of Lafayette, Indiana, stated "parks are for children and parks are for families. Families should be able to send their children to our parks, knowing that they are not . . . being window shopped by a sexual predator."[40]

Ironically, Heath's statement reveals the defect in his city's decision to ban John Doe from its parks. Window shopping means just that – looking in and peering from the outside. There is a major difference between looking and conduct. Doe merely watched; he did not engage in any conduct.

Part II of this article provides background on the right to freedom of thought, including a discussion of recent United States Supreme Court analysis on this right. Part III then describes, analyzes, and critiques the Seventh Circuit's 2004 en banc opinion holding that the City of Lafayette

36. Associated Press, *House Candidates Say Molester Ban Should Be Taken Statewide*, Associated Press Newswires (July 31, 2004) (available at WL, APWIRESPLUS database).

37. *Id.*

38. Framing is used here to refer to the rhetorical strategies, including such things as choice of words and what facts to include and exclude, that are used in describing an event and that make salient some issues surrounding the event while suppressing others, which, in turn, impacts how we think about, understand and process the event in question. *See generally* Joseph N. Cappella & Kathleen Hall Jamieson, *Spiral of Cynicism: The Press and the Public Good* 38-48 (Oxford U. Press 1997) (discussing the concept of framing within the field of journalism).

39. The framing of the issue by politicians as one about protecting children rather than one about protecting a constitutional right became clear in July 2003 when David Heath, the mayor of Lafayette, Indiana, told a national television audience on *The O'Reilly Factor* that "what we were trying to do is very simple, and that's protect children." *The O'Reilly Factor* (Fox Broad. Co. July 2, 2003) (TV broadcast).

40. *Id.*

did not violate John Doe's right to freedom of thought. Importantly, Part III contends there are at least four separate reasons, each grounded in First Amendment jurisprudence tied to freedom of expression, why the majority erred in its conclusion. These reasons go far beyond those articulated in the dissenting opinion in *City of Lafayette* and thus suggest new and additional rationales for reversal. Next, Part IV demonstrates the dangerousness of the precedent set by the majority's reasoning as it might apply to other scenarios, including the first two hypothetical fact patterns laid out at the beginning of this article. Finally, the article concludes in Part V that the United States Supreme Court should accept certiorari in this case and reverse the Seventh Circuit's decision.

II. FREEDOM OF THOUGHT: OF PRECEDENT AND IMPORTANCE

More than a decade ago, First Amendment scholar Rodney A. Smolla described what he called "the inviolable primacy of freedom of thought."[41] Smolla, now Dean of the University of Richmond's T.C. Williams School of Law, posed the following question:

> [W]ho would defend the prerogative of the state to censor thought? Only by accepting that man is a creature of the state and that even the intimate internal processes of mind that distinguish human existence are enjoyed at the state's sufferance could such a monstrous and awesome intrusion be justified. To accept the proposition would be to accept the extinction of thousands of years of moral evolution, in which the world has come slowly and painfully to recognize that men possess certain entitlements to dignity and autonomy by sheer virtue of their humanity.[42]

Freedom of thought, in other words, is an important moral principle, not simply a legal one, that is linked to autonomy and individualism.[43] And although a federal court recently observed that "the constitutional basis for the protection of freedom of thought has never been fully clarified," it is a concept that "undeniably finds its root in the First Amendment, and is undeniably protected," prized and privileged by the United

41. Rodney A. Smolla, *Freedom in an Open Society* 11 (Alfred A. Knopf, Inc. 1992).

42. *Id.*

43. *See* Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 142 (U. of Cal. Press 1985) (writing that "[w]e believe in the dignity, indeed the sacredness, of the individual. Anything that would violate *our right to think for ourselves*, judge for ourselves, make our own decisions, live our lives as we see fit, is not only morally wrong, it is sacrilegious") (emphasis added).

States Supreme Court as integral to a democratic society.[44] As the late Justice Felix Frankfurter once wrote, "without freedom of thought there can be no free society."[45]

Since Justice Frankfurter's statement more than half a century ago, freedom of thought has received renewed and reinvigorated interest from the nation's high court, particularly in the past three years. For instance, in declaring unconstitutional a Texas anti-sodomy statute, Justice Anthony Kennedy wrote in 2003 for the majority of the Court that "[l]iberty presumes an autonomy of self that includes *freedom of thought*, belief, expression, and certain intimate conduct."[46] For Justice Kennedy, the concept of freedom of thought was closely linked to one of the "more transcendent dimensions" of human liberty and privacy.[47]

Just one year prior, in striking down on First Amendment grounds of overbreadth[48] a federal law criminalizing virtual images that appeared to be of minors engaged in sexual conduct,[49] Justice Kennedy wrote for the Court, stating:

> First Amendment freedoms are most in danger when the government *seeks to control thought* or to justify its laws for that impermissible end. The *right to think* is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.[50]

Importantly, Kennedy's words came in the context of a case that, like *City of Lafayette*, focused on the dangers of sexual predators that prey on children. In particular, in *Ashcroft v. Free Speech Coalition*, the federal government argued that the Child Pornography Prevention Act was justified, in part, because "virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct."[51]

In rejecting this argument, Kennedy wrote that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning

44. *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 717 (6th Cir. 2001).
45. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring).
46. *Lawrence v. Tex.*, 539 U.S. 558, 562 (2003) (emphasis added).
47. *Id.*
48. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 912 (2d ed., Aspen Law & Bus. 2002) ("A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.").
49. The law at issue was the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260 (2000), which made it a crime to possess and distribute images that merely appeared to be of minors engaging in sexual conduct even though no actual children were used in the production or creation of the images.
50. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (emphasis added).
51. *Id.*

it."[52] The same thing, of course, might be said for thoughts – that the mere tendency of one's thoughts to encourage unlawful acts is not a sufficient reason for banning them. Kennedy buttressed this position by quoting from the Court's opinion on the private possession of obscene material[53] in *Stanley v. Georgia*.[54] Justice Kennedy noted that Stanley stood for the proposition that government authorities "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[55]

Significantly, Kennedy observed that "the Court's First Amendment cases draw vital distinctions between words and deeds, between *ideas* and *conduct*."[56] It is this latter dichotomy that is so pivotal in the *City of Lafayette* case, given John Doe's failure to take any action on his thoughts beyond simply sitting in a park and watching children play. Kennedy wrote that, with regard to the Child Pornography Prevention Act, "there is here no attempt, incitement, solicitation, or conspiracy."[57] Likewise, John Doe made no attempt to molest children playing in a park; he merely thought about it, controlled his thoughts and impulses, and left.

Kennedy and the majority thus were able to declare the Child Pornography Prevention Act unconstitutional despite the twin recognitions that pedophiles "flirt with . . . impulses" to molest children and that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people."[58] Parsed differently, Kennedy and the majority were able to distinguish their own beliefs and feelings about the repulsive subject matter at issue from their legal analysis. However, as this article argues in Part III, the majority of the Seventh Circuit in *City of Lafayette* may have been unable to separate its disgust and revulsion with John Doe's prior actions and his present thoughts from its legal analysis of the case. While one can surely sympathize with the majority for not providing John Doe with what might be considered "the right to think the unthinkable,"[59] and while one can, reasonably see the need to sacrifice individual autonomy for societal safety, the majority's opinion nonetheless is flawed.

Given the fact that John Doe's fantasies involved the molestation of children, it is important to note that at least one scholar believes that, in the

52. *Id*.

53. *Id*. at 247 (citing *Miller v. Cal.*, 413 U.S. 15, 24 (1973)). *Miller* set forth the Supreme Court's current test for obscenity.

54. *Stanley v. Ga.*, 394 U.S. 557 (1969).

55. *Free Speech Coalition*, 535 U.S. at 253 (quoting *Stanley*, 394 U.S. at 566).

56. *Id*. at 253 (emphasis added).

57. *Id*.

58. *Id*. at 244-45.

59. This phrase is borrowed from a very different context where the right to think is cherished perhaps more than any other – higher education. *See Report of the Committee on Freedom of Expression at Yale*, 4 Human Rights 357, 357 (Summer 1975).

United States, child pornography–a type of content often linked in the minds of many to the molestation of minors by pedophiles[60]–already "has become a thought crime."[61] Amy Adler, an associate professor of law at New York University, wrote in a recent law review article:

> [O]nce our interpretation depends on the pedophile's imagined response to the picture, we have begun to police thoughts and fantasy, not actions. The harm of the pictures no longer turns on what happened to the child. It now occurs in the possibility of seeing a picture in a certain way, in how someone might perceive the child. The determination of whether a picture is child pornography has grown increasingly bound up in our projections of whether these pictures will permit pedophiles to fantasize about them. Thus, child pornography law has begun to police speech based on how people may respond to it. This is in direct contravention of traditional First Amendment tenets.[62]

Of particular concern here for Professor Adler is the test under federal law for determining whether certain images of minors depict a "lascivious exhibition of the genitals or pubic area."[63] Such an exhibition involving a minor is deemed to constitute sexually explicit conduct forbidden by the Child Pornography Prevention Act.[64] In ferreting out whether such an exhibition exists, at least one federal appellate court has held that the key is the "appeal to the lascivious interest of an audience of pedophiles."[65] Another federal appellate court has said that whether an image is lascivious is determined, in part, by whether an image is "presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur."[66] Under such an approach which focuses on a pedophile-viewer's reaction, "a deviant's subjective response could turn innocuous images into pornography."[67] For Adler, such a definition of child pornography–one that centers on the nexus

60. *See e.g.* R. Barri Flowers, *The Sex Trade Industry's Worldwide Exploitation of Children*, 575 Annals of the Am. Acad. of Political & Soc. Sci. 147, 152 (May 2001) (writing that "[t]he consumers of child pornography are predominantly male child molesters, pedophiles, and others with an abnormal sexual interest in children"); Tim Tate, *The Child Pornography Industry: International Trade in Child Sexual Abuse* in *Pornography: Women, Violence & Civil Liberties* 203, 211-13 (Catherine Itzen ed., Oxford U. Press 1992) (describing "the new breed of child pornographers: abusers who produced their own material" and observing "the fundamental relationship between paedophilia [sic] and child pornography").

61. Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 995 (2001).

62. *Id*.

63. 18 U.S.C. § 2256 (defining "sexually explicit conduct" to include "lascivious exhibition of the genitals or pubic area of any person"); Adler, *supra* n. 61, at 946-47.

64. 18 U.S.C. §§ 2251-2260.

65. *U.S. v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994).

66. *U.S. v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

67. *U.S. v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

between images and thoughts–is tantamount to a thought crime because it pivots on the fact that "we do not like the way people *think* about certain pictures of children."[68] She adds that "[t]he law demands that we examine pictures to determine how a pedophile would see them; we then criminalize these pictures, or not, depending on that viewpoint."[69]

The Supreme Court's decision in *Free Speech Coalition*, handed down just one year after the publication of Professor Adler's article, does little to mitigate her concerns. *Free Speech Coalition* focused solely on virtual images of child pornography in the context of the Child Pornography Prevention Act of 1996. The opinion did not address or disturb in any way how courts interpret the meaning of the phrase "lascivious exhibition" which is based on how a pedophile thinks about an image or photograph.

It is worth noting here that John Doe, the convicted pedophile at the center of the *City of Lafayette* case, also was thinking about an image, albeit a real-life image of children playing, rather than one captured by a camera. He simultaneously converted this image into a perverted fantasy, which got him in trouble with officials in Lafayette, Indiana. Adler's concern that child pornography is a thought crime thus might provide the legal bridge that allowed the majority in *City of Lafayette* to connect thoughts and punishment.

Seventy-five years before *Free Speech Coalition*, Justice Louis Brandeis wrote in 1927 that those who won our independence in the United States "believed that the *freedom to think as you will* and to speak as you think are means indispensable to the discovery and spread of political truth."[70] Of course, John Doe clearly was *not* seeking to discover or spread some indispensable political truth while he was sitting and thinking in a City of Lafayette park. In other words, his thoughts were not the type of requisite precursors to valuable speech that Justice Brandeis envisioned protecting. Indeed, Doe's thoughts were prurient and deviant. Yet, as this article argues in Part III, the First Amendment protection of speech today shelters many forms of thoroughly low-brow expressive content, not simply uplifting political expression. The First Amendment, in turn, should protect decidedly non-intellectual and offensive thoughts, provided they do not manifest themselves in either criminal conduct (in which case the conduct, not the thoughts, is illegal) or in one of those limited categories of expression that falls outside the scope of constitutional protection, such as true threat of violence and obscenity.[71]

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68. Adler, *supra* n. 61, at 995 (emphasis added).

69. *Id.*

70. *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

71. The categories of unprotected speech include child pornography involving real children, *N.Y. v. Ferber*, 458 U.S. 747, 763-64, (1982); imminent incitement to violence and unlawful conduct, *Bran-*

Taken collectively, all of the rather grandiose statements quoted above, both old and new, suggest that freedom of thought both deserves and receives absolute protection as an unenumerated right under the First Amendment. But in July 2004, a fractured United States Court of Appeals for the Seventh Circuit issued an en banc opinion that makes it clear that there are limits on freedom of thought.

III. THINKING THE UNTHINKABLE AND THE NEED TO PROTECT IT

When a person transforms his deviant sexual thoughts about children into deviant writings about them, he moves from the realm of thought to the realm of speech, and he risks punishment and prosecution. For instance, an Ohio man named Brian Dalton pleaded guilty and was sentenced to seven years in prison in 2001 "for creating and possessing a personal diary containing violent sexual fantasies involving children."[72] The decision,[73] along with the statute on which it was based,[74] was roundly criticized by many, including Harvard Law School Professor Laurence Tribe, who called it "as close as you can get to creating a thought crime."[75]

Tribe's comments would prove prophetic in March 2004 when Judge David E. Cain held that Dalton, who had by that time spent eighteen months in prison, was wrongly convicted and could not be tried again.[76] Judge Cain opined that "[t]he defendant's thoughts, no matter how hideous, were still just that – thoughts, the pathetic products of a sick imagination."[77] The judge added that while the State of Ohio was correctly concerned that Dalton, who had a previous conviction for possession of child pornography when the diary was found, might re-offend, "the judicial branch of government must resist the temptation to engage in pre-emptive strikes."[78] Prosecutors had argued to Judge Cain at a previous hearing that

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denburg v. Ohio, 395 U.S. 444, 447 (1969); true threats, *Watts v. U.S.*, 394 U.S. 705, (1969) (per curiam); obscenity, *Roth v. U.S.*, 354 U.S. 476, 483-85 (1957); some forms of libel, *Beauharnais v. Ill.*, 343 U.S. 250, 266 (1952); and fighting words, *Chaplinsky v. N.H.* 315 U.S. 568, 572-73 (1942).

72. Matthew Sostrin, *Private Writings and the First Amendment: The Case of Brian Dalton*, 2003 U. Ill. L. Rev. 887, 887 (2003).

73. *See State v. Dalton*, 793 N.E.2d 509 (Ohio App. 10th Dist. 2003) (describing the conviction of Brian Dalton, but also determining that he was provided with such ineffective assistance of counsel such that Dalton's guilty plea should have been withdrawn).

74. Ohio Rev. Code Ann. § 2907.321 (West 2003).

75. Sostrin, *supra* n. 72, at 888 (citing Kevin Peraino, *A Seven-Year Sentence for a Diary*, Newsweek 36 (July 30, 2001) (available at 2001 WL 19505065) (quoting Professor Laurence Tribe)).

76. *Good Riddance; Judge Is Right to Halt Case of Man Tried for Deviant Thoughts*, Columbus Dispatch (Columbus, Ohio) 6A (Mar. 9, 2004) (available at LEXIS, News library, COLDIS file).

77. *Id*.

78. Kevin Mayhood, *State Can't Retry Author of Child Porn*, Columbus Dispatch (Columbus, Ohio) 1A (Mar. 5, 2004) (available at LEXIS, News library, COLDIS file).

Dalton was dangerous because he "literally mulls over the idea of sex with children when he sees them on the street."[79]

Just four months after Judge Cain's well-reasoned March 2004 decision, the United States Court of Appeals for the Seventh Circuit issued an opinion in July 2004 allowing Lafayette, Indiana to make such a preemptive strike against a man known as John Doe. Doe, like Dalton, mulled the idea of having sex with children when he saw them. While Dalton once may have been, as his attorney put it, "the only person in America serving time for writing down his thoughts in a personal diary,"[80] today John Doe is the only man in America banned from public parks simply because of his thoughts. Thoughts that, unlike Dalton, he never even wrote down.

How can it be, then, that a federal appellate court, one including prominent jurists such as Richard Posner and Frank Easterbrook, allowed a man's freedom of movement to be restricted because of his deviant thoughts? As this Part makes clear, the answer is his freedom of movement hinged on his freedom of thought.

A. *"If You Can Take a Man's Life for the Thoughts That's in His Head"*[81]

Banning a man from a public park for his thoughts is a far cry from taking away his life, but the principles of freedom of thought suggest that neither punishment is warranted. Yet, it was the former prohibition that divided the members of the Seventh Circuit Court of Appeals in July 2004 in *Doe v. City of Lafayette*. While the judges on the Seventh Circuit ultimately parted ways on the outcome of the case, there certainly was at least one matter on which they all agreed. The man known as John Doe, who is now in his late 40s,[82] is anything *but* a model citizen, regardless of his "above-average intelligence and the bachelor's degree in management he earned from Purdue University in the late 1970s."[83] As Judge Williams

79. Jeb Phillips, *Sex-Diary Writer Expected to Leave Jail*, Columbus Dispatch (Columbus, Ohio) 12B (Sept. 16, 2003) (available at LEXIS, News library, COLDIS file).

80. Tim Doulin, *Diary Writer Seeks Dismissal of '01 Conviction; Lawyers Say Obscenity Plea Flawed*, Columbus Dispatch (Columbus, Ohio) 6C (Apr. 9, 2003) (available at LEXIS, News library, COLDIS file).

81. Bruce Springsteen, *Johnny 99*, in *Nebraska* (Columbia Records 1982) (CD) (singing from the perspective of a man just sentenced to ninety-nine years in prison "if you can take a man's life for the thoughts that's in his head [t]hen won't you sit back in that chair and think it over judge one more time [a]nd let 'em shave off my hair and put me on that execution line").

82. *See* Joe Gerrety, *Park Ban Sparks Lawsuit, Debate Over Sex Offenders*, J. & Courier (Lafayette, Ind.) 18A (Apr. 4, 2004) (available at LEXIS, News library, JNLCOU file) (describing Doe as "now in his late 40s").

83. Joe Gerrety, *'Paying for Being Honest,'* J. & Courier (Lafayette, Ind.) 8A (Apr. 4, 2004) (available at LEXIS, News library, JNLCOU file).

wrote for the dissent, Doe's "criminal history includes convictions for child molestation, voyeurism, exhibitionism, and window peeping," and he "has been hospitalized, imprisoned, under house arrest, and on probation."[84] The dissent, which ruled in favor of Doe's right to freedom of thought, even called the content of those thoughts "repugnant and deplorable."[85] Doe, in common parlance, would probably be considered a pervert. As Judge Ripple wrote for the majority, Doe once "went into a locker room at a local school, pulled down the swimsuit of a ten-year-old boy and performed oral sex on him. The next year, Mr. Doe forcibly performed oral sex on a twelve-year-old boy."[86]

In January 2000, when the incident that gave rise to the dispute in *City of Lafayette* occurred however, it had been nine years since Doe's last conviction[87] and he was not on probation at the time.[88] Ultimately, what occurred on a Saturday evening in early January 2000 in a park in Lafayette, Indiana would send Doe's life back into darkness. Perhaps more importantly, it would also give rise to a set of facts that tests just how far the judiciary is willing to stretch and extend the unenumerated constitutional right of freedom of thought when the thoughts in question relate to committing one of the most heinous of crimes – child molestation.

Doe's own words, taken under oath in a deposition, describing the events (and thoughts) of that night are both clear and chilling. Doe was "in the mood of cruising" and went looking "mostly" for children in Murdock Park,[89] a 39-acre park, featuring "[p]laygrounds, disc golf course, sled run, basketball court, lighted softball field, 0.9 mile interpretive trail, picnic areas and grills."[90]

For the attorney defending the City of Lafayette in the lawsuit that Doe would later file against it in November 2000, it allegedly was the *conduct* by Doe of driving to a park with playgrounds and a ball field, and looking for children, rather than any *thoughts* that caused him to be banned from city parks. As attorney Jerry Withered told the members of the Seventh Circuit Court of Appeals in January 2004 during oral argument for the city, "Mr. Doe was not banned from the Lafayette city parks for what he thought. He was banned for what he did. He's in the park, and before he

84. *City of Lafayette*, 377 F.3d at 774 (Williams, Rovner & Wood, JJ., dissenting).

85. *Id*. at 784.

86. *Id*. at 758 (majority).

87. *Id*. at 774 (Williams, Rovner & Wood, JJ., dissenting) (writing that Doe's "last conviction was in 1991, ten years before this litigation").

88. *Id*. at 774, n. 4 ("Doe was not on probation in January 2000 and was not even restricted from entering the park during his period of house arrest a decade earlier.").

89. *Id*. at 759 (majority).

90. *See* Lafayette-West Lafayette Convention & Visitors Bureau, *Recreation*, http://www.lafayette-in.com/recreation.html (accessed Apr. 23, 2005).

got to the park, he's cruising around looking for children."[91] Doe's attorney countered that "[t]he city is saying because of what is in your mind, and the fact that it is in your mind while you are near children, we can ban you."[92]

What precisely was John Doe thinking about in the park? When asked that question during a deposition in the case, Doe stated the following:

> When I saw the three, the four kids there, my thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of, you know, having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. It's a wide open area. Those thoughts were there, but they, you know, weren't realistic at the time. *They were just thoughts*.[93]

He watched the children for 15-30 minutes, and without having any contact with them, left the park.[94] Doe also stated in the deposition that he said "to [him]self: I've got to get out of here before I do something, so I left."[95] He added in an affidavit, "I was not planning to act on my thoughts. I recognized that these were just unhealthy thoughts and I realized I needed to leave the park, which is what I did."[96] Doe did in fact leave peacefully and the city "did not receive any complaints from the children in the park."[97]

At this stage, no one else knew what Doe had been thinking while he was watching the children play in Murdock Park. But this would soon change when he transformed his thoughts into speech. Shortly after leaving the park, Doe paged his psychologist and "explained what occurred and expressed that he was upset about the incident. As part of his treatment, his psychologist suggested that he discuss the incident with his Sexual Addicts Anonymous (SAA) group, which was to meet a few days later."[98] The sad irony is that his remarks to the group about his thoughts would not remain anonymous. Indeed, Doe recently told a reporter for the local paper in Lafayette, Indiana, that he "suspects that someone in the group tipped his former probation officer, which led to officials banning him from the

91. Joe Gerrety, *Parks Ban Arguments Heard*, J. & Courier (Lafayette, Ind.) 16A (Jan. 10, 2004) (available at LEXIS, News library, JNLCOU file).
92. *Id*.
93. *City of Lafayette*, 377 F.3d at 760 (emphasis added).
94. *Id*. at 774 (Williams, Rovner & Wood, JJ., dissenting).
95. *Id*.
96. *Id*. at 774, n 2.
97. *Id*. at 779.
98. *Id.* at 775 (Williams, J., dissenting).

parks."[99] Thus, Doe was punished for trying to do the right thing – seeking help at a group therapy session. As Doe himself noted in a 2004 interview, "I did the right thing by leaving [the park]. I did the right thing by calling my therapist that night. I did the right thing by telling my group the next night. I've been paying for that for the past four years – paying for being honest."[100] Judge Williams translated this paradox into legal terms, writing for the dissent that "[t]he First Amendment's concern with freedom of thought as a basis for the freedom of expression is highlighted by the facts of this case. The chilling effect of this ruling, i.e., that the communication of one's thoughts may result in being banned from public spaces, is frightening."[101]

In early February of 2000, Doe received letters from Lafayette, Indiana officials notifying him that he was banned both from all of the city's parks and from all of the city's school grounds.[102] Doe did not contest the school ban but he objected to the park prohibition because he wanted to go there to play softball, watch little league games, and walk with friends.[103] He filed a lawsuit in federal court against the City of Lafayette in November 2000[104] contending, among other things, that the city was "punishing him for his private thoughts."[105]

B. *Thoughts, Actions, and the Notion of Psychiatric Brinkmanship*

The key to understanding why the majority ruled in favor of the City of Lafayette while the dissent ruled against it is found in one critical difference in their interpretation and understanding of the facts. That difference pivots on a fundamental dichotomy between thought and action. Simply put, the majority believed John Doe was banned from parks because of his *actions* and *conduct* – not because of his *thoughts* and *fantasies* – on that day in January 2000.[106] As Judge Ripple wrote for the majority:

> The City has not banned him from having sexual fantasies about children. It did not ban him from the public parks because he admitted to having sexual fantasies about children in his home or even in a coffee shop. The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of

99. Joe Gerrety, *Paying for Being* Honest, J. & Courier (Lafayette, Ind.) 8A (Apr. 4, 2004).
100. *Id.*
101. *City of Lafayette*, 377 F.3d at 784 (Williams, J., dissenting).
102. *Id.* at 760 (majority).
103. *Id.*
104. *Id.* at 758.
105. *Id.* at 765.
106. *Id.* at 766-67.

> committing child molestation. He had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation.[107]

By focusing on Doe's "conduct in going to the park in search of children to satisfy his deviant desires,"[108] the majority was able to give short shrift to the First Amendment concerns of freedom of thought. The majority opined that "[t]he First Amendment's freedom of mind principle does not subject every conduct-focused regulation to First Amendment scrutiny; rather, it only prohibits those regulations aimed at *pure thought* and thus mind control."[109] For the majority, it was the *act* of intentionally driving to the park to look for children–conduct the majority described as "psychiatric brinkmanship"[110]–that moved the case out of the realm of pure thought and into the arena of conduct.

Such judicial sleight of hand and fixation on conduct is not unusual among jurists in First Amendment cases when the speech in question is repugnant or deeply offensive. For instance, the United States Supreme Court faced the issue in 1971 of whether the First Amendment protected a man's right to wear, in a Los Angeles courthouse, a jacket emblazoned with the words "Fuck the Draft."[111] While the majority of the Court ruled in favor of Paul Robert Cohen and found that his case was about the First Amendment right of free speech,[112] the dissent held that the case involved "mainly conduct and little speech."[113] The dissent thus wrote in *Cohen* that "agonizing over First Amendment values seems misplaced and unnecessary."[114] Importantly, the logic that the case was about conduct rather than speech allowed Justice Hugo Black, a free speech absolutist,[115] to side with the minority and not protect Cohen's jacket.[116]

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107. *Id.*
108. *Id.* at 764.
109. *Id.* at 765 (emphasis added).
110. *Id.* at 762.
111. *Cohen v. Cal*, 403 U.S. 15 (1971).
112. *Id.* at 18 (writing that Cohen's "conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.' ").
113. *Id.* at 27 (Blackmun, J., dissenting).
114. *Id.*
115. *See generally* Don R. Pember & Clay Calvert, *Mass Media Law* 43 (14th ed., McGraw Hill 2005) (describing the absolutist theory of free speech in which "[t]he government cannot censor the press for any reason. There are no exceptions.").
116. *See* John Zelezny, *Communications Law: Liberties, Restraints, and the Modern Media* 59 (4th ed., Wadsworth 2003) (writing that Justice Hugo Black "argued for some form of absolutist approach to interpretation of the First Amendment," but noting that "Black interpreted his absolutism narrowly,

The justices in *Cohen* thus divided themselves along the lines of a speech-versus-conduct dichotomy. Similarly, the judges in *City of Lafayette* divided themselves along a thought-versus-conduct dichotomy. While the majority of the Seventh Circuit found the ban of John Doe to be based on conduct, the three dissenting judges squarely disagreed. Judge Williams wrote for the dissent that it was "clear on this record, that absent Doe's thoughts . . . the City would be uninterested in Doe's decision to go to the park that fateful day."[117] This had to have been the case because, as Williams added, "the City acknowledges that Doe's own revelation of his thoughts, not any outward expression demonstrating his thinking, is the basis for its actions."[118]

Judge Williams concluded that "going to the park does not rise to the level of an 'action' of sufficient gravity to justify punishment."[119] He reasoned, by way of example:

> In the same way that the individual with a history of robbing banks could not be charged with attempted bank robbery for standing across the street from the bank and thinking about robbing it, Doe may not be punished for merely thinking perverted thoughts about children.[120]

Adding another example to illustrate her point, Judge Williams wrote that "punishing a drug addict who stands outside a dealer's house craving a hit but successfully resists the urge to enter and purchase drugs would be offensive to our understanding of the bounds of the criminal law."[121]

Because the majority and dissent disagreed on whether the case pivoted on John Doe's conduct or John Doe's thoughts, both sides framed the issues and interests at stake in different fashions. The majority framed the case as one about protecting children from the *conduct* of a convicted pedophile, playing up Doe's status as a sex offender[122] while, conversely,

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arguing that, because speech and press freedoms were mentioned explicitly, only those strict forms of expression were protected").

117. *City of Lafayette*, 377 F.3d at 778.

118. *Id.* at 776 (Williams, J., dissenting).

119. *Id.* at 783.

120. *Id.*

121. *Id.*

122. *Id.* at 767 (majority) (The majority wrote, for instance, that "Mr. Doe is an admitted sexual addict with a proclivity toward children; as such, he belongs to a group of persons who are more susceptible to having sexual desires with respect to children *and* to acting on those urges. We cannot ignore, nor can we say the law somehow commands the City to ignore, Mr. Doe's pedophilia and the history of his battle with that affliction. Facing this reality certainly does not license society, acting through government, to exile, harass or marginalize Mr. Doe, but it permits government to fulfill its responsibility to protect vulnerable children in dangerous situations.") (emphasis in original).

eliminating from that framing any constitutional concerns about the freedom of thought and First Amendment scrutiny.[123] As the majority wrote:

> The First Amendment does not prohibit the City from taking the action it did to protect its children. It does not require the City to act in an ostrichlike fashion and expose the children of the City to the risk that, on a future date, a child will wander further from the group, present a better opportunity and experience the tragic consequences.[124]

The majority posed twin hypothetical, what-if questions that focused on the danger to children, not the danger to constitutional rights. The majority asked, "[w]hat if there were only one child there that evening? Would Mr. Doe have succumbed to his urges and considered the opportunity more 'realistic'?"[125] It is somewhat striking and disturbing that a federal appellate court would seem to be justifying its decision, at least in some small part, on a set of hypothetical questions and fact patterns *not* before it, guessing what may or may not have happened. It was as if the majority was acting more like a law professor tweaking a hypothetical in front of a class than like a court bound by the facts before it.

Yet the majority tipped its hand, revealing that the case was *not* about any conduct that actually occurred, when it wrote that "Mr. Doe brought himself to the *brink*."[126] That statement begs the question: The brink of *what*? The answer is obvious – the brink of criminal conduct. And the fact is that Doe never engaged in criminal conduct; he never traversed and crossed the chasm that divided thought from action while in Murdock Park that night in January 2000.

In contrast to the majority's conduct-centric framing of the issues, the dissent wrote that the case raised a trio of freedom-of-thought based questions:

> May a city constitutionally ban one of its citizens from public property based on its discovery of that individual's immoral thoughts? Is being banned from public property a 'punishment'? Does the First Amendment protect a citizen's right to think about

123. The First Amendment issue of freedom of thought was eliminated, for the majority, because of its claim that First Amendment scrutiny was only applicable to "pure thought" cases. *See supra* nn. 109-10 and accompanying text.

124. *City of Lafayette*, 377 F.3d at 767.

125. *Id.* at 762.

126. *Id.* at 762 (emphasis added).

committing a crime, even if he has committed that crime in the past?[127]

The answers to these questions for the dissent were, in the order asked above: no, yes, and yes. More simply put, the dissenting judges concluded that "the City of Lafayette may not punish Doe for his thinking alone, for without protection from government intrusion into our thoughts, the freedoms guaranteed by the First Amendment are virtually meaningless."[128]

C. *Four First Amendment-Based Reasons Why the Majority Got it Wrong*

The freedoms of thought and speech are inextricably linked. John Stuart Mill wrote, nearly 150 years ago in *On Liberty* about "the liberty of thought, from which it is impossible to separate the cognate liberty of speaking and of writing."[129] Far more recently, Rodney Smolla wrote that, "[t]he *linkage of speech to thought*, to man's central capacity to reason and wonder, is what places speech above other forms of fulfillment, and beyond the routine jurisdiction of the state."[130] But one does not need the words of a law school dean or prominent First Amendment scholar to appreciate this fact. The well-worn cliché "think before you speak"[131] tells us that much. Ironically, of course, John Doe did think before he spoke – he just never should have spoken up about his thoughts. John Doe's case aside, it is clear that thought should be a prerequisite for expression.

Given this close connection between thought and speech, as well as the fact that the freedom of each is covered by the same constitutional amendment, it is reasonable to attempt to understand, using principles derived from free expression jurisprudence, why the majority of the Seventh Circuit erred in ruling against John Doe on the issue of freedom of thought. The reasons set forth below are either in addition to or significantly expand upon those of the dissent in *Doe v. City of Lafayette*. They provide, then, a different rationale for understanding the flaws with the majority's logic and conclusion.

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127. *Id.* at 776 (Williams, J., dissenting).

128. *Id.* at 785.

129. John Stuart Mill, *On Liberty* 18 (Currin V. Shields ed., Bobbs-Merrill Co. 1956) (originally published 1859).

130. Smolla, *supra* n. 41, at 10.

131. The phrase is usually used when a person says something stupid that gets that person into trouble. *See* Phyllis Stark et al., *Disco, Davidians, and Diatribes: The Dubious Distinction Awards*, Billboard 97 (Dec. 25, 1993) (giving out a "Think Before You Speak Award" to a program director at a rock music radio station who "practically fired himself" at a National Association of Broadcasters meeting when he said, "There has to be that one guy at your station who lives and breathes the music. Now I'm not that guy, and if that guy isn't your program director, you should fire him.").

1. *The Seventh Circuit's Flawed New Doctrine of "Pure Thought"*

In holding that John Doe's case was not subject to First Amendment scrutiny, the majority of the Seventh Circuit wrote that "[t]he First Amendment's freedom of mind principle does not subject every conduct-focused regulation to First Amendment scrutiny; rather, it only prohibits those regulations aimed at *pure thought* and thus mind control."[132] For the majority, "a government entity no doubt runs afoul of the First Amendment when it punishes an individual for *pure thought*."[133] Why restrict First Amendment protection of the right to think to pure thoughts only, rather than applying it to situations in which there is a combination or hybrid of thought and action? The majority simply reasoned that "[l]imiting First Amendment protection to pure thought is rooted in common sense."[134]

In fact, while the majority relies heavily on the doctrine of "pure thought"–it uses that phrase, moreover, six different times across a span of only three pages[135]–it is a brand-new doctrine, its own invention that is not grounded on precedent. An online, keyword search of all United States Supreme Court opinions for all dates reveals that there is not a single case that includes the phrase "pure thought."[136] There are, then, no Supreme Court opinions containing both "pure thought" and "First Amendment." At the federal appellate court level, there are only four opinions (other than the initial[137] and en banc[138] rulings in *Doe v. City of Lafayette*) ever written that include the phrase "pure thought."[139] None of those opinions were from the Seventh Circuit Court of Appeals.[140]

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132. *City of Lafayette*, 377 F.3d at 765 (emphasis added).

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.* at 765-67.

136. To conduct this research, the author of this article, on September 17, 2004, used the "Legal Research" section of the LexisNexis® Academic online database, searching under "Federal Case Law" for "Supreme Court Cases" for all available dates. The "keyword" search was for the phrase "pure thought." The online database is available to subscribers at http://web.lexis-nexis.com/universe/form/academic/legalresearch.html (last visited for purposes of this specific search on Apr. 23, 2005).

137. *Doe*, 334 F.3d 606, *vacated and reh'g granted*, 2003 U.S. App. LEXIS 16563 (7th Cir. Aug. 8, 2003).

138. 377 F.3d 757.

139. *See U.S. v. Ragsdale*, 438 F.2d 21, 26 (5th Cir. 1971), *cert. denied*, 403 U.S. 919 (1971) (using the phrase "pure thoughts" only one time in the context of the sentence "[n]oble motives and pure thoughts cannot bar the conviction of one who admits intentional action which violates the proscriptions of a statute declaring that action criminal, and a judge can properly instruct as to what acts the statute condemns, which is the most the instructions did here"); *U.S. v. Howard*, 504 F.2d 1281, 1284 (8th Cir. 1974) (using the phrase "pure thoughts" only one time and quoting it in the context from another case, "Noble motives and pure thoughts cannot bar the conviction of one who admits intentional action which violates the proscriptions of a statute declaring that action criminal") (citing *Ragsdale*, 438 F.2d at 26); *Winter v. G. P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (using the phrase "pure thought" only one time, in context of a case in which an individual sued the publisher of a book on mushrooms, in support of the proposition that a "'How to Use' book is pure thought and

In fact, the Seventh Circuit's pure thought doctrine–a doctrine under which no First Amendment scrutiny is applied in a case if there is any combination or mixture of thoughts with conduct–directly conflicts with fundamental principles of First Amendment free expression jurisprudence. In particular, the United States Supreme Court has recognized and clearly established that when speech and conduct are combined, First Amendment scrutiny *does* apply. Thus the *conduct* of flag burning may involve and combine with such expressive elements that it is said to constitute speech protected by the First Amendment.[141] Under the Court's symbolic speech doctrine "conduct is analyzed as speech under the First Amendment if, first, there is the intent to convey a specific message and, there is a substantial likelihood that the message would be understood by those receiving it."[142]

If conduct can mix with expressive elements and be subjected to First Amendment scrutiny, then why shouldn't conduct be able to mix with elements of thought and imagination and also be subjected to First Amendment scrutiny? Neither the majority nor the dissent addressed the symbolic speech doctrine or this paradox.

Furthermore, it is clear that the thoughts involved in *Doe v. City of Lafayette* are not merely *de minimis*, incidental, or tangential to conduct. It was the thoughts of John Doe that initially caused him to drive to Murdock Park and, once there, it was *only* his thoughts, when later translated to speech at a therapy session, that landed Doe in trouble, as he engaged in no conduct while at the park (unless the majority considered sitting conduct, something which even it did not have the moxie to assert). Anyone can drive to a park and sit on a bench in Forrest Gump-like fashion.[143] What made Doe different from some latter-day Gump was the perverted thoughts that ran through his head.[144]

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expression"); *Steffan v. Perry*, 41 F.3d 677, 698 (D.C. Cir. 1994) (using the phrase "pure thought" only one time in the context of a case involving a former Navy midshipman who admitted to being a homosexual constitutionality of the regulations pursuant to which he was discharged from the Naval Academy).

140. *See supra* n. 139 (identifying the appellate courts in question that have used the phrase "pure thought").

141. *See Tex. v. Johnson*, 491 U.S. 397 (1989) (holding that the conviction, under a Texas law, of Gregory Lee Johnson for publicly burning an American flag in 1984 near the Republican National Convention as a sign of political protest violated his First Amendment right of free speech).

142. Chemerinsky, *supra* n. 48, at 1027.

143. *See* Eleanor Ringel, *Movies; Review; "Mamma Roma,"* Atlanta J. & Const. 8P (May 19, 1995) (describing "Forrest Gump on his park bench").

144. While the fictional Gump benignly pondered his box of chocolates, Doe deviously pondered pedophilic desires. *See* Maria Laurino, *A New Breed of Hero*, Houston Chron. 10 (July 4, 1994) (describing how the character Forrest Gump "sits squarely on a park bench in a starched cream suit, his shirt buttoned to the collar, holding a box of chocolates").

In a weak attempt to support its newly minted pure thought doctrine, the majority in *City of Lafayette* cited the United States Supreme Court's opinion in the child pornography possession case of *Osborne v. Ohio*.[145] The majority of the Seventh Circuit wrote:

> In rejecting Osborne's First Amendment arguments, the Court distinguished its freedom of thought precedent: The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.[146]

The difference between the two cases is clear; real children are harmed when child pornography is created. No real children, however, were harmed by John Doe in Murdock Park in January of 2000. *Osborne's* consideration of freedom of thought thus is readily distinguished from the issue and facts in *City of Lafayette.*

2. *Viewpoint-Based Discrimination on Thought and Expression*

Justice William Brennan, a staunch supporter of First Amendment rights,[147] once wrote that "viewpoint discrimination is censorship in its purest form."[148] It is a point that courts have re-affirmed over the years. For instance, the United States Court of Appeals for the Eleventh Circuit wrote in 2004 that the First Amendment provides a right "to be free of viewpoint-based discrimination and punishment"[149] and that "one of the most egregious types of First Amendment violations is viewpoint-based discrimination."[150] The government should remain neutral as to viewpoints on particular issues when it regulates expression.[151] The prohibition against viewpoint-based regulations represents "a fundamental First Amendment principle – that government may not proscribe speech or expressive conduct because it disapproves of the ideas expressed."[152] For

145. 495 U.S. 103 (1990).
146. *City of Lafayette*, 377 F.3d at 776 (quoting *Osborne*, 495 U.S. at 109).
147. *See generally* Robert D. Richards, *Uninhibited, Robust, and Wide Open: Mr. Justice Brennan's Legacy to the First Amendment* (Parkway Publishers 1994) (detailing Brennan's contributions to free speech jurisprudence).
148. *Perry Educ. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).
149. *Holloman v. Harland*, 370 F.3d 1252, 1281 (11th Cir. 2004).
150. *Id.* at 1279.
151. *See generally Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 444-45 (W.D. Tex. 2001) (discussing "[t]he prohibition against viewpoint discrimination, and the requirement of its converse, viewpoint neutrality").
152. *Id.* at 444.

instance, the government could not permissibly regulate only *pro-life* speech on the topic of abortion but allow *pro-choice* speech on the same topic to go unfettered.

Academics concur with this assessment. For instance, former Stanford Law School Dean Kathleen M. Sullivan and the late constitutional law professor Gerald Gunther have written that "[t]he Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment."[153]

If viewpoint-based regulation of expression is prohibited, then, by implication and analogy in First Amendment jurisprudence, viewpoint-based regulation of thought, the precursor to expression, must also be prohibited. Yet the majority's opinion in *City of Lafayette* represents the ultimate in viewpoint-based discrimination. Why? Because, on the topic of children and how one should think about them, Doe was punished precisely because of his pedophilic viewpoint – precisely because he viewed, in his mind, children as sex objects for his desire, gratification and satisfaction. In comparison, had John Doe gone to Murdock Park and harbored what most would consider to be positive, non-pedophilic thoughts about children, the City of Lafayette would not have taken action against him and, furthermore, the Seventh Circuit Court of Appeals never would have heard of this particular John Doe. For instance, if Doe had sat on a bench in the park and thought to himself, "those children have so much energy and great futures ahead of them. I wish them the best of luck in school and in their rest of their lives," then nothing would have happened to him. It was only because of Doe's deviant viewpoint on the topic of children that he was banned from Lafayette's parks.

As a general principle, then, the majority's opinion in *City of Lafayette* embodies and embraces viewpoint-based discrimination on a person's thoughts. For the appellate court, one may freely possess "good" thoughts about a topic like children, but one cannot have "bad" thoughts about that same subject matter. The decision thus flies in the face of established First Amendment jurisprudence in the area of free speech and it begs for reversal by the United States Supreme Court.

3. *Free Speech Theory Applied: The Marketplace of Ideas & Self-Realization*

Two important and well-established theories about the importance of free speech–the marketplace of ideas and self-realization/self-fulfillment–support and provide rationales for John Doe's right to freedom thought.

153. Kathleen M. Sullivan & Gerald Gunther, *First Amendment Law* 212 (2d ed., Found. Press 2003).

Neither theory was mentioned by either the majority or the dissent in *City of Lafayette*, but each provides an important justification for the protection of Doe's thoughts, given the proximity between thought and speech. Those justifications are described below.

a. *Marketplace of Ideas*

The marketplace of ideas theory for protecting expression "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons,"[154] and it "is perhaps the most powerful metaphor in the free speech tradition."[155] Professor Martin Redish observes that "over the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public."[156] The metaphor is used frequently today.[157] More than seventy-five years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the *thought* to get itself accepted in the competition of the market."[158] As Holmes' quotation suggests, the theory embodies what Professor Daniel Farber calls "the truth-seeking rationale for free expression."[159]

The premises and goals of the marketplace of ideas theory of free speech, when applied to freedom of thought, support John Doe's case and the need for reversal of the majority's opinion. First, the theory is logically borrowed from the realm of speech because "ideas" are, after all, thoughts; one could easily substitute the phrase "marketplace of thoughts" for "marketplace of ideas." It is only the use and engagement of speech that transforms private thoughts into a public marketplace of ideas in which one's thoughts–one's ideas–compete against those of other individuals.

John Stuart Mill, the philosopher closely associated with the marketplace of ideas theory,[160] recognized the importance of protecting thought, observing that an individual is sovereign over his own mind.[161] Mill wrote

154. Matthew D. Bunker, *Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity* 2 (Lawrence Erlbaum Assocs. 2001).

155. Smolla, *supra* n. 41, at 6.

156. Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. Rev. 1083 (1999).

157. *See e.g. Va. v. Hicks*, 539 U.S. 113, 119 (2003) (describing an "uninhibited marketplace of ideas").

158. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

159. Daniel A. Farber, *The First Amendment* 4 (2d ed. Found. Press 2003).

160. *See* Bunker, *supra* n. 154, at 3 (writing that "[m]arketplace theory grew in sophistication as a result of British philosopher John Stuart Mill's 1959 defense of free speech in 'On Liberty' ").

161. Mill, *supra* n. 129, at 13.

in *On Liberty* that the region of human liberty includes "the inward domain of consciousness, demanding *liberty of conscience* in the most comprehensive sense, *liberty of thought* and feeling."[162] Ultimately, it was John Doe's conscience that moved him voluntarily to leave Murdock Park, without harming anyone, and to seek help from his psychologist.

Second, "the core insight of marketplace theory–fallibilism–leads us to exercise great caution before silencing viewpoints with which we disagree."[163] Both the majority and dissent in *City of Lafayette* disagreed with the viewpoint of John Doe on children, as would almost anyone, yet the marketplace metaphor serves "as a stabilizing force against"[164] the urge to censor such viewpoints. Under the marketplace theory, Doe is allowed to hold his viewpoint (in this case, it initially was an internal viewpoint that was only later expressed at his therapy session) and the proper remedy for it is counterspeech,[165] not censorship. At the heart of the counterspeech doctrine is the idea, as Justice Louis Brandeis once wrote, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[166]

Doe, in fact, went to his group therapy session–a mini-marketplace of ideas, as it were–to seek help and correction for his deviant ideas. The speech of the other members of the group would serve as counterspeech. But, ultimately, John Doe was punished for this action and for his speech, if one believes his assertion that it probably was someone from that group who told his former probation officer about his views about children while in Murdock Park.[167] Ironically, had Doe engaged in self-censorship–had he chosen not to speak up in this marketplace of ideas and, instead, exercised his right not to speak–he would not have been punished. But self-censorship and silence does not make "bad" thoughts go way; it only drives them underground, as it were, where they may fester and breed larger problems later. Thus, the idea in First Amendment jurisprudence that free speech serves as a "safety valve"[168] preventing trouble is relevant here

162. *Id.* at 16 (emphasis added).
163. Bunker, *supra* n. 154, at 8.
164. *Id.*
165. *See generally* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. Rev. 553 (2000) (analyzing the counterspeech doctrine and providing some relatively recent examples of its application in free speech controversies).
166. *Whitney v. Ca*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
167. *Supra* n. 99 and accompanying text.
168. Farber, *supra* n. 159, at 6.

as well.[169] Had Doe not expressed his feelings in an effort to cure his urges and impulses, his problems might have built up.

The marketplace of ideas metaphor also supports Doe in another way. In particular, it should be the worth of the idea–the quality of the thought–that matters most in the competition of ideas, *not* the character of individual behind the idea. Put differently, it is the quality of the idea, not the quality of the individual thinker behind it, that is pivotal. Justice Holmes thus focused on "*the power of the thought* to get itself accepted in the competition of the market,"[170] not the power or lack thereof of the individual behind the thought.

It seems clear that John Doe's thoughts, once expressed and discussed, should not be "accepted" in the competition of the market but rather driven out from it. However, the problem, from a marketplace of ideas perspective, is that the majority of the Seventh Circuit placed far too much emphasis on the quality of the man behind the thought. For instance, the majority wrote:

> We cannot ignore, nor can we say the law somehow commands the City to ignore, Mr. Doe's pedophilia and the history of his battle with that affliction. Facing this reality certainly does not license society, acting through government, to exile, harass or marginalize Mr. Doe, but it permits government to fulfill its responsibility to protect vulnerable children in dangerous situations.[171]

Dissenting Judge Williams recognized the majority's over-emphasis, if not reliance, in its reasoning on the character of the person behind the thought. She wrote that the "only factors that differentiate Doe from others are that the City was apprised of his thoughts while he was in the park and *its knowledge of his past conduct*."[172] Doe's First Amendment right of free thought should not be reduced in importance because of what he has done in the past. As Judge Williams wrote, it is an "axiomatic principle" that punishment of a person for his or her status is "impermissible under the Eighth Amendment."[173] And while the First Amendment rights of prisoners in jail are not coextensive with those of individuals on the other side of

169. *See generally* Kent R. Middleton et al., *The Law of Public Communication*, 30 (Allyn & Bacon 2004) ("Free expression can act as a safety valve, allowing critics to participate in change rather than seek influence through antisocial acts.").

170. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

171. *City of Lafayette*, 377 F.3d at 767.

172. *Id.* at 779 (Williams, J., dissenting).

173. *Id.* at 782. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII.

the bars,[174] Doe was no longer in prison or on probation. He was a free man who had served his time.

b. *Self-Realization/Self-Fulfillment*

A second rationale or theory for protection of free speech is self-realization and self-fulfillment of the individual, regardless of whether some larger truth is discovered in the marketplace of ideas. In this theory, free speech is privileged as "an end in itself, an end intimately entwined with human autonomy and dignity."[175] As Smolla writes, the "freedom to speak without restraint provides the speaker with an inner satisfaction and *realization of self-identity* essential to individual fulfillment."[176] Bunker notes that under this theory, which he dubs individual autonomy, "[f]reedom of speech contributes to individuals' opportunities to develop their rational faculties and *to make critical decisions about the pursuit of a good life*."[177]

The last line above is italicized for a particular reason. Why? Because it was through the freedom of thought, that John Doe made critical decisions about the pursuit of a good life. In the internal struggle in his own mind that went on that January day in 2000 in Murdock Park, Doe made the right decision – he decided to leave and to call his psychologist. He decided that his own *identity* would not–at least not on that occasion–be that of a child molester, but rather one of a person seeking to gain control over his own life through his thoughts, his speech and, subsequently, his behavior.

If the theory of self-realization is tied to human dignity and autonomy interests,[178] then Doe should be rewarded, not punished because his autonomous decision-making process ultimately resulted in Doe keeping his behavioral impulses in check. It violates the principle of human dignity to punish Doe when, ultimately, he made the dignified decision to leave and to seek further treatment. Significantly, in an interview in 2004 with a reporter from a local newspaper, Doe pondered why he went to the park in the first place, stating "[t]he only thing I can come up with was that it was

174. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (adopting a lesser standard of scrutiny to apply to restrictions on the speech rights prisoners; writing that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"; and reasoning that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration").

175. Smolla, *supra* n. 41, at 9.

176. *Id.* (emphasis added).

177. Bunker, *supra* n. 154, at 12 (emphasis added).

178. Bellah, *supra* n. 43 and accompanying text.

maybe a test. Just to see if, being 'free,' if I'd continue to act the way I had under probation and house arrest."[179] Doe thinks that he passed that mental test,[180] and his psychologist "focused on the fact that Doe was able to control his urge and leave the park as a positive step in his rehabilitation."[181]

Doe was able, then, in this private mind game to take a metaphorical mental eraser, as it were, to his deviant thoughts and to keep them in check with different thoughts – thoughts about the better person that he longed and desired to be. That, after all, surely explains why he immediately called his psychologist after leaving the park to tell her about what had just taken place. As Doe stated during a deposition in the case, "I recognized that these were just unhealthy thoughts and I realized I needed to leave the park, which is what I did."[182] In brief, the First Amendment theory of self-realization through speech, when extended to apply to self-realization through thought–thought being the requisite precursor to speech–militates in favor protecting John Doe and reversing his ban from Lafayette's public parks.

4. *Offensive Ideas, Not Just Offensive Images*

Judge Williams' dissent does an excellent job in emphasizing the Supreme Court's recognition in *Ashcroft v. Free Speech Coalition*,[183] described above in Part I, that fake images of minors engaged in sexual conduct cannot be banned simply because of the mental gymnastics and thought processes of pedophiles that transform them into sexual stimuli that may lead to deviant conduct. She writes that the Court held that "the fact that possession of virtual child pornography may ignite sexually immoral thoughts about children was not enough to justify banning it."[184] Likewise, she notes the Court's rejection in *Free Speech Coalition* of the federal government's argument that the images can be banned because those thought processes may lead to criminal conduct.[185] As Justice Kennedy wrote for the majority of the high court:

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and

179. Gerrety, *supra* n. 83.
180. *Id.*
181. *City of Lafayette*, 377 F.3d at 775 (Williams, J., dissenting).
182. *Id.* at 774.
183. 535 U.S. 234.
184. *City of Lafayette*, 377 F.3d at 777 (Williams, J., dissenting).
185. *Id.* at 778-79.

> speech must be protected from the government because speech is the beginning of thought.[186]

While Judge Williams correctly focuses on this language and *Free Speech Coalition's* protection of offensive imagery of computer-generated children, it is important to point out another area left unaddressed by the dissent involving offensive expression that also supports Doe's case. In particular, *Free Speech Coalition* dealt with offensive *images* and how those images were mentally mapped in minds of pedophiles. But Doe's case does not revolve around offensive *images* that he examined; rather, it pivots on the offensive *ideas* in his head about allegedly procuring and plotting to seduce children in a park. As Doe admitted:

> [M]y thoughts were . . . [to] possibly expose myself to them . . . [and] having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. It's a wide open area. Those thoughts . . . weren't realistic at the time.[187]

The case thus centers as much on *offensive ideas* of seduction of children as it does about fantasized *offensive images* of actual molestation. The case must be made, then, that offensive ideas–not just offensive images–are protected by the freedom of thought.

To this extent, it is somewhat surprising that the dissent in *City of Lafayette* failed to seize upon the United States Supreme Court's supportive language in *Texas v. Johnson*.[188] In particular, Justice William J. Brennan wrote that "[i]f there is a bedrock principle underlying the First Amendment, it is that *the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable*."[189] If the expression of an offensive idea is protected by the First Amendment, then surely the idea itself must also be protected, *regardless* of whether it ever is transformed into written, spoken or symbolic expression. Thus, while Doe's thoughts clearly were offensive, they nonetheless would be protected under the precedent of *Texas v. Johnson* extended into the realm of thought.

Doe's thoughts and fantasies in the park dealt with a sexual taboo – sex between adults and children. Interestingly, the United States Supreme Court has protected offensive imaginative expression relating to a similar sexual taboo – incest. In *Hustler Magazine v. Falwell*,[190] the Court held

186. *Ashcroft*, 535 U.S. at 253.
187. *City of Lafayette*, 377 F.3d at 760.
188. 491 U.S. 397 (1989).
189. *Id.* at 414 (emphasis added).
190. 485 U.S. 46 (1988).

that the First Amendment protected a sexual explicit magazine's imaginative message that a well-respected religious figure engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[191] The Court, in support of its decision, cited an earlier opinion for the following proposition:

> The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.[192]

This language thus bridges principles of protection for offensive speech with the theory of the marketplace of ideas described earlier.[193] If offensive expression is protected, then surely offensive thought is protected. After all, absent some kind of thought police that are able to get inside our heads to read our minds, offensive thought must manifest itself in the form of speech in order for it to be known. No one would have known the offensive thoughts of John Doe in Murdock Park had he not transformed those thoughts into speech conveyed to his psychologist and therapy group.

In summary, there are multiple reasons why, from a First Amendment perspective, John Doe's thoughts, however offensive or deviant they might have been, deserve protection against government action and retribution. The next part of this article examines the possible ramifications of the majority's holding in *City of Lafayette* should other courts adopt its analysis in future cases.

IV. CONSIDERING THE POSSIBILITIES: THE THOUGHT BUBBLES ABOVE OUR HEADS

In an August 2004 editorial that generally lauded the majority opinion of the Seventh Circuit Court of Appeals in *City of Lafayette*, the staff of the Lafayette *Journal & Courier* nonetheless posed an interesting and cautionary question to its readers: "[i]f thoughts were visible, as balloons hovering over the heads of cartoon characters, imagine the graphic stories being told through the park, through the mall or through any public area. How many

191. *Id.* at 48.
192. *Id.* at 55-56 (quoting *FCC v. Pacifica Found.*, 438 U. S. 726, 745-46 (1978)).
193. *Supra* nn. 153-74 and accompanying text.

more would be booted from city parks as a precaution?"[194] The newspaper's answer to its own query–"[m]ore than we might think, unfortunately"[195]–reveals the fundamental trouble with the Seventh Circuit's opinion.

In particular, who among us has not, at some point, harbored a thought about committing crime and then, like John Doe, thought twice and not acted it out? As a divorced colleague of the author at The Pennsylvania State University half-jokingly remarked when told about the majority opinion in *City of Lafayette*, "I suspect there'd be an awful lot of ex-spouses out there doing hard time."

The hypotheticals at the start of this article help to illustrate other problems with both the feasibility and workability of the Seventh Circuit's approach in *City of Lafayette* as applied to other situations. In particular, they highlight three key factors or variables in the appellate court's decision-making process that remain vague and undefined in their future applications. Those variables are:

• ***Distance***: How close must one be, in terms of physical distance and proximity, from the object(s) or target(s) of the criminal activity about which one thinks before one can be punished for the thoughts?

• ***Conduct***: How much conduct on the part of the thinker, as it were, is necessary under the Seventh Circuit's new pure-thought doctrine[196] before one is stripped of any First Amendment protection for freedom of thought?

• ***Prior Conduct***: How much emphasis is placed on the past bad acts–the prior criminal conduct–of the thinker in determining whether thoughts may be punished or accounted for by governmental entities when it comes to banning or prohibiting individuals from entering specific locations?

With regard to the issue of physical distance and proximity, it was important for the Seventh Circuit that John Doe drove to a park where he had ready and easy access to the targets, in this case children, of his deviant thoughts. How would this be applied to the first hypothetical in which a man who harbors the thought of assassinating the President of the United States is close enough to see George W. Bush as he steps out of his car near Madison Square Garden? How would it apply to the high school student in the second hypothetical who fantasizes about killing his classmates while he plays a video game in an arcade located just one block from his school? Would it matter how long that block is?

194. *A Victory for Parents, Parks in 'John Doe' Case*, J. & Courier (Lafayette, Ind.) 5A (Aug. 2, 2004).

195. *Id.*

196. *See supra* nn. 132-40 and accompanying text (describing the pure thought doctrine created by the majority in *City of Lafayette*).

As to the second variable–conduct–precisely how many steps and actions are necessary on the part of the thinker before the notion of freedom of thought is left by the wayside under the appellate court's new-fangled pure thought doctrine? For the Seventh Circuit Court of Appeals, it was John Doe's conduct of driving a car to a location where children were present that was sufficient to allow the majority not to apply First Amendment scrutiny. Is there sufficient conduct in the first scenario on the part of the actor to similarly lead a court to conclude that First Amendment scrutiny is irrelevant? Is the act of attendance at an angry and heated political rally such sufficient conduct? Is the mere act of standing enough conduct to waive, as it were, First Amendment protection for freedom of thought? What about the high school boy in the second scenario? Is the act of playing a video game–something that some people believe causes violence and aggression among teens–sufficient action to eliminate First Amendment protection for the violent fantasies in his head? Or is the act of walking to the video arcade, much like Doe drove to a park, sufficient conduct to scrap protection of thought? What if the student had walked to the school grounds immediately after playing the video game, while he was still having fantasies about shooting his classmates?

Finally, as to the third variable–prior bad acts on the part of thinker–how much weight does one give in the first scenario to the fact that the individual at the anti-Bush rally recently completed a prison term for the crime of assault with a deadly weapon? As noted earlier, the majority of the Seventh Circuit emphasized in its reasoning John Doe's long criminal record of sexual deviance. How extensive, then, must one's record be before a city or municipality is justified in banning an individual from a political rally in a park? How recent must the last prior conviction have been in time to the bad thoughts which trigger action against him? What if a person has no prior convictions or has never before engaged in the criminal activity about which he thinks but then, later, mentally recants? Would it make a difference in the second scenario if a fact was added that the high school student once was arrested and convicted for animal cruelty for shooting his neighbors' cats?

These questions are left unanswered here precisely because the Seventh Circuit's reasoning is such that it leaves plenty of wiggle room and legal leeway for possibility and speculation. The case of John Doe clearly tests our limits on the freedom of thought because it deals with taboos–sex between adults and children–that are among the most reprehensible and reviled of crimes in the United States. But the assassination of a president is similarly tragic and reviled, as are school shootings in which innocent young lives are lost because of seemingly senseless violence. Would they

be treated similarly? Only time and future cases will provide the answers to this and the other questions raised above.

V. CONCLUSION

The seventeenth-century French philosopher Rene Descartes famously proclaimed "*cogito ergo sum*," which translates to English as "I think, therefore I am."[197] After the Seventh Circuit's opinion in *Doe v. City of Lafayette*, it seems like it is not too much of a stretch to rephrase that quotation to read, "I think criminal thoughts, therefore I am a criminal."

Although John Doe had a criminal record, he was free when he harbored his criminal thoughts. It was a violation of his First Amendment right to freedom of thought to ban him, because of his internal mind games and deviant ideas, from Murdock Park and other venues in the City of Lafayette. This article has suggested multiple reasons, in both Parts II and III, why the majority of the Seventh Circuit Court of Appeals reached the wrong conclusion in its July 2004 decision. The reasons suggested here go far beyond those identified by the three dissenting judges in the case. The two fictitious scenarios set forth at the start of this article further help to illustrate problems with the majority's conclusion.

The philosopher Voltaire wrote that "the great consolation in life is to say what one thinks."[198] For John Doe, however, it was the great scourge of his life to say what he was thinking in a park one January day in 2000. Had he concealed his thoughts, had he not sought treatment from his psychologist after he left the park, he never would have run afoul of the law, and we would never know about John Doe's case. Ultimately, then, Doe was punished for sharing his thoughts with others. To not share one's internal thoughts with others, no matter how bizarre or deviant they may be, not only contradicts the two theories of freedom of expression described in Part II, but it denies the very ability of one to be human through speech. It is often said that hard cases make for bad law; in Doe's case, it might be more appropriate to say that bad thoughts made for bad law.

In summary, the Seventh Circuit majority's logic and its reasoning in *City of Lafayette* are both misguided and dangerous. Other courts must reject it and, instead, preserve and strengthen the constitutional right to

197. *See* Descartes' Epistemology, *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/descartes-epistemology/#Cogito (accessed Apr. 23, 2005).

198. *See* QuoteWorld.Org, http://www.quoteworld.org/author.php?thetext=Francois+Marie+Arouet+Voltaire+(1694-1778) (accessed Apr. 23, 2005).

freedom of thought so recently trumpeted by the United States Supreme Court.[199]

199. *See supra* nn. 46-56 and accompanying text (setting forth recent pronouncements by the United States Supreme Court on freedom of thought).